United States Court of Federal Claims

No. 92-721 L
December 11, 2008
Unpublished

East Cape May Associates,

***Plaintiff*,**

v.

United States of America,

Defendant.

Ripeness Doctrine; Article III Case-or-Controversy Requirement; Plaintiff's Burden to Establish Court's Jurisdiction

OPINION AND ORDER

This case is hereby dismissed because plaintiff has failed to establish this court's jurisdiction. The case, now 16 years old, was originally filed in 1992 in our predecessor court, the United States Claims Court, and has been assigned to four different judges (one of whom is now deceased). The case was stayed in 1994, pending the resolution of an on-going, related New Jersey state case. Compl. 1; Order, Feb. 16, 1994. During this stay, the court ordered the parties to file periodic status reports informing the court of the progress of the state action. Order, Dec. 14, 2000. Over the past year, the parties have represented that the state court action is "close to being settled." Joint Status Report ("J.S.R."), Nov. 6, 2007; J.S.R., Mar. 11, 2008; J.S.R., Oct. 7, 2008; J.S.R., Nov. 13, 2008. In their latest status report, the parties now request that this court intercede with the United States Army Corps of Engineers ("the Corps") to facilitate the issuance of a previously-denied federal wetlands permit.[1] J.S.R., Nov. 13, 2008. It is this permit and its "denial" that forms the heart of plaintiff's regulatory taking and breach of contract claims in this court. Am. Compl. ¶¶ 25–41.

The parties' request prompted the court to conduct a status conference by telephone, during which time the court informed the parties that it believed that it was without authority (and indeed, it would be improper) to interfere with the federal permitting process. The court also raised, *sua sponte*, the issue of jurisdiction by questioning whether the instant case was "ripe" for adjudication because no federal permitting decision on the merits had issued and, therefore, no final agency action had occurred. *See, e.g.*, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson*,

[1] The parties suggested, "once the [state matter] is settled that [plaintiff] and the [Corps] meet with Your Honor and establish a schedule for the Wetlands Permit decision." J.S.R. 1–2, Nov. 13, 2008.

473 U.S. 172, 186 (1985). Accordingly, the court ordered the parties to show cause why this matter should not be dismissed for lack of jurisdiction. Order to Show Cause, Nov. 18, 2008.

The facts of this case are not in dispute. Plaintiff, East Cape May Associates, holds title to 100 acres of land in Cape May, New Jersey, on which plaintiff desires to build single family homes. Am. Compl. ¶¶ 6, 20. On or about August of 1990, plaintiff applied for a permit with the Corps as part of plaintiff's land development effort. Am. Compl. ¶ 21. The Corps denied the application without prejudice because plaintiff failed to first secure a required permit from the New Jersey Department of Environmental Protection and Energy. Am. Compl. ¶ 22.

The fact that the Corps has never considered this application on its merits raises questions about the justiciability of plaintiff's claims due to ripeness concerns. In the regulatory takings context, the Federal Circuit has recognized that "courts are reluctant to permit themselves to be drawn into a dispute between a property owner and a land use regulatory agency until the agency has had an opportunity to evaluate the situation fully and make a considered decision." *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997) (citing *Williamson County Reg'l Planning Comm'n*, 473 U.S. 172 at 193); *see also Morris v. United States*, 392 F.2d 1372, 1376 (Fed. Cir. 2004) ("Where further process could reasonably result in a more definite statement of the impact of the regulation, the property owner is generally required to pursue that avenue of relief before bringing a takings claim."); *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999) ("[W]here a government entity provides procedures for obtaining a final decision, a takings claim will not be ripe until the property [o]wner complies with those procedures."). Indeed, the Supreme Court has stated that a regulatory taking claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186.

Ripeness is a necessary element of this court's jurisdiction. Article III of the United States Constitution limits federal court jurisdiction to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). The ripeness doctrine, like all justiciability doctrines, derives from this case-or-controversy requirement. *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003). The doctrine serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967).

Because the issue of ripeness goes directly to the heart of this court's jurisdiction, the court has a duty to raise the issue *sua sponte*, at any time, even though the parties may not. *See Coalition for Common Sense in Government Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1315–16 (Fed. Cir. 2006) ("It is appropriate for us to consider ripeness even though it is not raised by the parties because ripeness is a jurisdictional consideration that the court may address *sua sponte*."); *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988) ("considerations of ripeness are sufficiently important that we are required to raise the issue *sua sponte* even though the parties do not"). To be sure, even absent such a challenge, it is the plaintiff who bears the burden of establishing this court's jurisdiction. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp of Ind.*, 298 U.S. 178, 189 (1936)).

Here, the sum of plaintiff's efforts to carry this burden is a scant five paragraph letter filed in response to the court's show cause order, in which plaintiff fails to cite to any legal authority supporting this court's jurisdiction over plaintiff's claim. Pl.'s Letter, Dec. 2, 2008. Instead, plaintiff offered that "the [c]ourt . . . is familiar with this matter and [plaintiff] believes that such familiarity will help obtain a prompt resolution of this matter." *Id.* Plaintiff further argued that "there is [no] justification for the [c]ourt to reverse its fifteen-year history of overseeing this matter on the eve [of] when it is being resolved." *Id*.

Plaintiff's contentions are without merit. As illustrated above, ripeness is a core component of Article III's case-or-controversy requirement and where ripeness concerns persist, the court has a duty to address them *at any time*. The fact that this case has remained on the court docket for over sixteen years is of no moment. Without a case-or-controversy, this court does not possess jurisdiction to hear plaintiff's claims, no matter how "familiar with this matter" the court may be.

Whether couched as a breach of contract claim[2] or a regulatory takings claim, there are glaring questions regarding the justiciability of the matter due to ripeness concerns. In light of

[2] Plaintiff also asserts claims alleging that the failure of the Corps to issue the requested permit was tantamount to a breach of contract. Am. Compl. ¶¶ 33–41. Courts have generally frowned upon such breach of contract theories predicated on an agency's actions undertaken in the performance of its regulatory duties. *See, e.g.*, *Franklin Savings Corp.*, 56 Fed. Cl. 720, 746 (2003) (holding that allowing such breach of contract claims to proceed would contravene this court's jurisdictional mandate under the Tucker Act by allowing plaintiffs to challenge regulations that are not money mandating); *Lion Raisins, Inc. v. United States*, 54 Fed. Cl. 427, 432 (2002) (dismissing plaintiff's claim that agriculture regulation created an implied-in-fact contract because the regulation could not be characterized as a contract and was not money mandating).

plaintiff's response to the show cause order, it appears that plaintiff is either unable or unwilling to carry its burden in establishing this court's jurisdiction. Accordingly, it is ORDERED that the Clerk take the necessary actions to DISMISS this case. Each party shall bear its own costs.

s/ Lawrence J. Block

Lawrence J. Block
Judge